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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. RONALD GALE HEARTSILL, Defendant and Appellant.	A140212 (Contra Costa County Super. Ct. No. 51303957)

A jury found defendant Ronald Gale Heartsill guilty of two counts of committing a lewd act upon a child under age 14. (Pen. Code, § 288, subd. (a)[1]). Defendant raises three claims on appeal. He contends (1) the prosecutor improperly exercised a peremptory challenge to excuse a prospective juror based on race in violation of *Batson*/*Wheeler*[2]; (2) the second count of lewd conduct was not supported by substantial evidence; and (3) he was denied his Sixth Amendment right to confront an adverse witness because, even though the victim testified, defendant asserts she was effectively unavailable for cross-examination.

We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, referred to at trial as Jane Doe 1 (Jane), is defendant's daughter. Jane's mother had a relationship with defendant, but they never lived together. Jane was

[1] Further undesignated statutory references are to the Penal Code.

[2] *Batson v. Kentucky* (1986) 476 U.S. 79 (*Batson*); *People v. Wheeler* (1978) 22 Cal.3d 258 (*Wheeler*).

born in 2007. She lived with her mother in a one-bedroom apartment, and they each had a bed in the bedroom. After Jane was born, her mother learned that defendant was already married, but she continued to have an "off and on" sexual relationship with him. When defendant visited Jane's mother, they would have sex in the bedroom while Jane was in the front room of the apartment. Defendant would also play with Jane when he was at the apartment, and Jane's mother described him as "basically, you know, a loving father."

On Father's Day 2012, Jane attended preschool Sunday school at her church. The class worked on a craft project for Father's Day, during which Sunday school teacher Merisa Boyd asked what each child liked to do with his or her father and wrote down the answer. When Boyd asked Jane to tell her something she liked to do with her dad, Jane responded, " 'sometimes I get to play with his *carotcha*.' " Boyd asked Jane what a "*carotcha*" was, and Jane pointed to her private area. Boyd was shocked. She did not want any of the other children to hear what was said, so she moved on to another student.

After the craft project, Boyd had her assistant take the other children out for playtime. She took Jane aside and asked her to explain more about what a "*carotcha*" was. Boyd recorded Jane's response on her cell phone. Jane said, "In. Out. Shake . . . And move it. And then you play. That all you gotta do." She said, "I just play with it. [¶] . . . [¶] Take it out. [¶] Put it in." Boyd asked, "Put it in where?" Jane responded, "Put it inside my daddy's pants again. And then you just start playing." Jane's demonstration with her hands of how she played with the "*carotcha*" was very concerning because, according to Boyd, "it was masturbation." Boyd called Children and Family Services that day.

On July 3, 2012, Jane was interviewed at the Children's Interview Center (CIC) of the Martinez Police Department. She understood that she was being interviewed "because I talked to my teacher about my dad." Jane told the interviewer she played with her father's "caratcha finger." She said her dad "has a caratcha that's under pants." She said, "He makes me play with it," "When my daddy comes over," "He lets me," and "I do lots of things with it."

The interviewer asked how she knew about "caratchas," and Jane explained, "Because all people have caratchas," and, "I have one but it's not a finger one." She said, "My daddy doesn't move. It—your finger does if it gets really big." Jane "play[ed] with the caratcha with [her] hand," which meant "[t]ouching it." The interviewer asked when she usually sees the "caratcha," and Jane answered, "When my daddy comes." She said they played "at my house."

With a colored stick, Jane demonstrated what she did with the "caratcha." She said, "That's when I'm pulling it," and, "That's when my daddy shakes it and it has milk." She explained, "It's like the color of milk," and, "It leaks out" of "His caratcha." Jane said it "comes on his pants," and does not get on her "Because it—I wipe it off me." She learned the word "caratcha" from defendant.

Jane was asked what her mother knew about defendant's behavior. She said, when her father was at the apartment, "sometimes [her mother] stays and then she goes." Jane's mother did not know "about the caratcha," and she was not supposed to know. The interviewer asked, "Does—does your daddy want you to talk about it and tell your mom?" Jane responded, "No," and continued, "He might say I'm get in big trouble."

After Jane's interview at the CIC, a detective visited her apartment. The detective asked Jane where in the apartment she played with her father as she had talked about during the CIC interview. Jane pointed to two locations—the bedroom and the sofa in the living room.

The Contra Costa District Attorney charged defendant with two counts of committing a lewd and lascivious act upon Jane. (§ 288, subd. (a).) It was further alleged that defendant was a habitual sexual offender as he previously had been convicted of violating section 288, subdivisions (a) and (c), in 1984 and again in 1991. (§ 667.71.)

A jury trial began in September 2013. Jane testified at trial, and the jury also viewed her videotaped CIC interview and Boyd's cell phone recording made on Father's Day 2012. Jane testified, "I don't really know" where she heard the word "*carotcha*," but "pee comes out of it." The prosecutor asked if she ever saw her "daddy's *carotcha*," and

she responded, "One time." She said, "Maybe when—I think when my mom was take—I can't sleep so that's when I saw it on the bed."

The prosecutor asked, "What sorts of things would you do when you saw your dad's *carotcha*?" Jane responded, "I would just let him do what he was going to do." Then she said, "I'm going to tell you my story right now." She continued: "I think it was milk that came out or something. And then I, um—and then he took me to a restaurant by a house, that my mommy could stay because my mommy didn't want to go." The prosecutor asked whether this happened at her house. Jane answered, "When he shaked it, yes. The one by the restaurant, no." Asked what she did when she saw the "*carotcha*," Jane said, "I didn't do nothing." The prosecutor asked, "Was anyone touching the *carotcha*?" She responded, "I don't even know for myself. I'm just a kid."

Jane then testified she was nervous and it was tough to talk about. She said she was scared and missed her mama. Asked again about how many times she saw her father's "*carotcha*," Jane repeated that she saw it one time, but then added, "I don't remember how much I saw it."

Three witnesses, John Doe 1, John Doe 2, and Jane Doe 2, testified that defendant molested them when they were children.[3] (See Evid. Code, § 1108.)

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[3] John Doe 1, 42 years old at the time of trial, met defendant when Doe 1 was 7 or 8 years old and living in San Pablo. Doe 1 was close friends with defendant's daughter, who was about his age. Doe 1's best friend at the time was John Doe 2. Doe 1 and Doe 2 would sometimes go to defendant's house and defendant was there. Defendant was a night watchman at a Christmas tree lot, and he invited Doe 1 and Doe 2 to spend the night in his trailer there more than once. After Doe 1 had known defendant for about a year, in the trailer, defendant stuck his penis in Doe 1's mouth. He told Doe 1 if he told his parents, defendant would hurt them. Doe 1 saw defendant put his penis in Doe 2's mouth in the trailer, too. At defendant's house, defendant masturbated in front of Doe 1 and ejaculated on him. Defendant rubbed his semen on Doe 1's scrotum and told him it would help his hair grow. Doe 1 told the police in 1983.

John Doe 2 was 41 at the time of trial. Defendant was a friend of his dad's. He did not remember staying at a Christmas tree lot or camper. He remembered being in a bedroom of defendant's house, and defendant tried to penetrate Doe 2's "rear" with his penis. Asked whether defendant did anything to get him to participate, Doe 2 said, "It was like a game." He thought he was about 9 to 11 years old. Defendant also played

The jury found defendant guilty of both charged counts of committing a lewd act upon Jane (§ 288, subd. (a)), and found true as to both counts that defendant had substantial sexual conduct with Jane (§ 1203.066, subd. (a)(8)). In bifurcated proceedings, the trial court found that defendant had suffered nine prior strike convictions (§ 667, subd. (b)–(i), 1170.12) and served two prior prison terms (§ 667, subd. (a)(1)). As to each count, defendant was sentenced as a habitual sexual offender to 25 years to life (§ 667.71, subd. (b)), tripled to 75 years to life under section 1170.12, subdivision (c), plus a consecutive five years under section 667, subdivision (a), resulting in "a 10-year sentence determinate followed by a consecutive indeterminate sentence of 150 years to life."

DISCUSSION

A. *Asserted Batson/Wheeler Error*

During jury selection, defendant brought a *Batson*/*Wheeler* motion asserting the prosecutor improperly exercised peremptory challenges against two African-American prospective jurors, B.D. and G.E. The trial court denied the motion. On appeal, defendant claims the prosecutor's use of a peremptory challenge was racially motivated as to B.D. only. We find no error.

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with Doe 2's penis "[l]ike jacking off." Doe 2 was shown a police report and he remembered the tree lot. He recalled that he had his mouth on defendant's penis more than one time. At defendant's house, defendant asked Doe 2 to do "[f]oreplay basically," which meant "[t]ouch, lick, kiss," with defendant's now adult daughter. She, Doe 2, and defendant were all on a bed with no clothes on. Doe 2 went to the police the next day. At that time, the abuse by defendant had been going on more than six months.

Jane Doe 2 was 33 years old at the time of trial. She met defendant at a trailer park where she used to live. He lived down the street. She and other kids went to his trailer. She was 9 years old when she would go to his trailer to play Atari and watch TV. One time when she was alone at his place, he "st[u]ck his finger up my private spot." The same day he masturbated and ejaculated in front of her. In a shed by the trailer, defendant told her to take her clothes off, and he put his tongue on her "private spot." He told her not to tell, but she told her mother the next day.

1. *Background*

In his jury questionnaire, B.D. wrote that he was 36 years old, he had a master of fine arts, he worked as an educational recruiter, his spouse worked as an assistant manager, and his father was a deputy sheriff in Mobile County, Alabama. B.D. left blank the questions about number of children and their ages and occupations. In voir dire, the prosecutor again asked about children, and B.D. said he did not have any. The prosecutor continued, "No children. [¶] Do you have any interaction with any kids either through family, nieces, nephews or anything like that?" B.D. responded, "Most of my family is back in Alabama, so not really, not that much." The prosecutor asked, "When you go back to Alabama, do you have any interaction with any nieces or nephews?" B.D. answered, "Oh, yes, my cousins."

Defense counsel later asked whether B.D. talked to his father a lot about his father's work. B.D. said his father worked in narcotics and was on a SWAT team, but they did not discuss his work in detail. Counsel asked, "Did you ever want to be in law enforcement yourself?" B.D. responded, "No." Counsel said, "Yeah, I guess—it looked like I think I remember you have an MFA, so you went the creative route, right?" B.D. nodded in agreement.

The prosecutor used a peremptory challenge to excuse B.D. Later, the prosecutor exercised a peremptory challenge to excuse G.E. At this point, defense counsel brought a *Batson*/*Wheeler* motion. In chambers, defense counsel argued the prosecutor improperly excused the only two African-American prospective jurors who had been seated in the jury box.

The prosecutor responded that he did not believe a prima facie case had been shown. He also corrected defense counsel, noting that defense counsel had asked to excuse an African-American prospective juror for cause. Defense agreed that he had forgotten that there had been another African-American prospective juror besides G.E. and B.D.

The prosecutor then stated race-neutral reasons for excusing B.D. and G.E. He told the court: "As it relates to [B.D.], I do not have all my notes with me in here as it

relates to him here. But what I remember is his father was a police officer in Alabama with the sheriff. And the fact that he—the response that he gave about not wanting to pursue that career caused me concern. [¶] But more importantly than that is he has no interaction with kids on a regular basis. He goes back—he was unable to say that he had any interaction with cousins ever going back to Alabama, ever talking with them. And this case is all about being able to read the credibility of a minor witness. And he is unable to do that."[4]

In response, defense counsel argued there were other prospective jurors "who have had law enforcement relatives who did not pursue a law enforcement career" and others who had not had interaction with children.

The trial court found no *Batson*/*Wheeler* violation, explaining, "I will find that the reasons provided by [the prosecutor] are race-neutral." It appears that the prosecutor did not subsequently use any of his remaining peremptory challenges to excuse African-American prospective jurors. After the jury and alternate jurors were sworn in, defense counsel went on the record to state the jury included no African-Americans but Alternate No. 2 was African-American.

2. *Applicable Legal Principles*

"Both the federal and state Constitutions prohibit any advocate's use of peremptory challenges to exclude prospective jurors based on race. [Citations.] Doing so violates both the equal protection clause of the United States Constitution and the right to trial by a jury drawn from a representative cross-section of the community under article I, section 16 of the California Constitution." (*People v. Lenix* (2008) 44 Cal.4th 602, 612 (*Lenix*).)

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[4] As to G.E., the prosecutor stated that G.E. had been arrested before and believed the district attorney was "attempting to pin a drug sales charge on him." Further, when asked about the fact defendant had prior convictions, G.E. said, "The past is the past, and I'm not gonna even be thinking about that." This concerned the prosecutor because the case required jurors to consider defendant's prior acts and "and not disregard [them]." Defendant does not dispute that the prosecutor properly exercised a peremptory challenge to excuse G.E.

" 'A three-step procedure applies at trial when a defendant alleges discriminatory use of peremptory challenges. First, the defendant must make a prima facie showing that the prosecution exercised a challenge based on impermissible criteria. Second, if the trial court finds a prima facie case, then the prosecution must offer nondiscriminatory reasons for the challenge. Third, the trial court must determine whether the prosecution's offered justification is credible and whether, in light of all relevant circumstances, the defendant has shown purposeful race discrimination. [Citation.] "The ultimate burden of persuasion regarding [discriminatory] motivation rests with, and never shifts from, the [defendant]." ' " (*People v. O'Malley* (2016) 62 Cal.4th 944, 974 (*O'Malley*).)

Where, as in this case, the prosecutor offers race-neutral reasons for excusing the prospective jurors and the trial court does not decide whether a prima facie showing was made, the issue whether a prima facie case was shown is moot. (*O'Malley*, *supra*, 62 Cal.4th at pp. 974–975.) "Thus, the sole question [on appeal] is whether the trial court correctly ruled that the defense did not satisfy its burden of demonstrating discriminatory motivation at the third stage of the *Batson* inquiry." (*Id.* at p. 975.)

"The prosecutor's ' "justification need not support a challenge for cause, and even a 'trivial' reason, if genuine and neutral, will suffice." [Citation.] A prospective juror may be excused based upon facial expressions, gestures, hunches, and even for arbitrary or idiosyncratic reasons.' [Citation.] 'The proper focus of a *Batson*/*Wheeler* inquiry, of course, is on the subjective *genuineness* of the race-neutral reasons given for the peremptory challenge, *not* on the objective reasonableness of those reasons . . . . All that matters is that the prosecutor's reason for exercising the peremptory challenge is sincere and legitimate, legitimate in the sense of being nondiscriminatory.' " (*O'Malley*, *supra*, 62 Cal.4th at p. 975.) " 'At [the third] stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." [Citation.] In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are;

and by whether the proffered rationale has some basis in accepted trial strategy.' " (*People v. Johnson* (2015) 61 Cal.4th 734, 755.)

" ' "We review a trial court's determination regarding the sufficiency of a prosecutor's justification for exercising peremptory challenges ' "with great restraint." ' [Citation]. We presume that a prosecutor uses peremptory challenges in a constitutional manner and give great deference to the trial court's ability to distinguish bona fide reasons from sham excuses. [Citation.] So long as the trial court makes a sincere and reasoned effort to evaluate the nondiscriminatory justifications offered, its conclusions are entitled to deference on appeal. [Citation.]" ' " (*O'Malley*, *supra*, 62 Cal.4th at p. 975.) Thus, we ask only whether substantial evidence supports the trial court's conclusions. (*Lenix*, *supra*, 44 Cal.4th at p. 613.)

3. *Analysis*

Defendant contends, first, the trial court failed to conduct the requisite analysis and, second, even if it did, substantial evidence does not support its implicit conclusion that the decision to exclude B.D. did not stem from a discriminatory purpose. We reject both contentions.

First, we disagree with defendant's claim that the trial court was required to make more detailed findings in ruling on his motion. Defendant argues the trial court's ruling was inadequate because "[t]he law requires more than a global conclusion that no discrimination has taken place." However, "[w]hen the prosecutor's stated reasons are both inherently plausible and supported by the record, the trial court need not question the prosecutor or make detailed findings." (*People v. Silva* (2001) 25 Cal.4th 345, 386.) It is only "when the prosecutor's stated reasons are either unsupported by the record, inherently implausible, or both, [that] more is required of the trial court than a global finding that the reasons appear sufficient." (*Ibid*.)

In *People v. Lewis* (2008) 43 Cal.4th 415 (*Lewis*), disapproved on another ground in *People v. Black* (2014) 58 Cal.4th 912, the defendant similarly argued the trial court erred at the third step of the *Batson*/*Wheeler* analysis "because [the] court . . . denied each motion *without any comment or discussion*." (*Lewis*, at p. 471, italics added.) Rejecting

this argument, the California Supreme Court reasoned: "The trial court denied the motions only after observing the relevant voir dire and listening to the prosecutor's reasons supporting each strike and to any defense argument supporting the motions. Nothing in the record suggests that the trial court either was unaware of its duty to evaluate the credibility of the prosecutor's reasons or that it failed to fulfill that duty. [Citations.] Moreover, the trial court was not required to question the prosecutor or explain its findings on the record because, as we will explain, the prosecutor's reasons were neither inherently implausible nor unsupported by the record. [Citation.] Under these circumstances, we apply the usual substantial evidence standard." (*Ibid*.)

Likewise in the present case, the trial court observed the relevant voir dire and heard the prosecutor's reasons and defense counsel's argument before ruling, and as we will explain, the prosecutor's stated concern about B.D.'s lack of interaction with children[5] was neither inherently implausible nor unsupported by the record. Therefore, no detailed explanation was required, and the trial court's ruling was sufficient.[6]

Second, contrary to defendant's argument, the trial court's implicit finding of no purposeful discrimination was supported by the record. The prosecutor was primarily

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[5] Although the prosecutor first mentioned the fact that B.D. did not pursue a career in law enforcement, he was speaking without notes and it is likely that this was the first fact he remembered about B.D. because it was the topic of his most recent voir dire by defense counsel. However, it is clear from the record that the prosecutor's main reason for excusing B.D. was his lack of interaction with children.

[6] Nothing in the record suggests the trial court did not understand the law. Thus, this case is unlike *People v. Tapia* (1994) 25 Cal.App.4th 984, 1014–1015, in which "the trial court was not only unfamiliar with the applicable legal principles [for deciding a *Batson*/*Wheeler* motion] but . . . it actually utilized the wrong standard." *Barnes v. Anderson* (2d Cir. 1999) 202 F.3d 150, relied upon by defendant, is also inapposite. In that case, the district court expressly stated, "I won't rule on credibility of attorneys right now" before denying the *Batson* motion. (*Id*. at p. 157.) The federal appellate court concluded the district court erred because "[t]he credibility of an attorney offering a race-neutral explanation is at the very heart of that analysis." (*Ibid*.)

Here, we have no reason to deviate from the usual presumption that the trial court knew and applied the appropriate law. (See *People v. Adanandus* (2007) 157 Cal.App.4th 496, 503.)

concerned with B.D.'s lack of regular interaction with children because the case turned on the credibility of a young victim. The prosecutor told the court, "[T]his case is all about being able to read the credibility of a minor witness. And he is unable to do that." This is an inherently plausible explanation. Jane was four years old when she was interviewed at the CIC, and was five at the time of trial. It was reasonable for the prosecutor to believe that a person with little exposure to young children would not be well-equipped to assess Jane's credibility.

There was substantial evidence to support a finding that the prosecutor's stated reason was genuine. Early in voir dire, the prosecutor observed: "We all have strong feelings about crimes against children. And it's important in selecting a jury that we get a jury from a wide variety of backgrounds. That includes parents, grandparents, *people that have interactions with kids*, even though that's really difficult to listen to that type of case." (Italics added.) Thus, before he had exercised a single peremptory challenge, the prosecutor was on record that he was looking for jurors who "have interactions with kids." And, as the Attorney General points out, prior to questioning B.D., the prosecutor asked other prospective jurors whether they had "any interaction with children" or "any interaction with kids" in "daily life," "on a regular basis," or at work.

B.D. said he had no children and "not really, not that much" interaction with children because most of his family was in Alabama. This supported the prosecutor's explanation that he excused B.D. because "he has no interaction with kids on a regular basis." Defendant argues the record is "objectively contrary" to the proffered nondiscriminatory reason because the prosecutor stated B.D. "was unable to say that he had any interaction with cousins ever going back to Alabama, ever talking with them," but B.D. said he did have interactions with his cousins when he went back to Alabama. We see no material contradiction here. B.D. responded "not really, not that much" when asked if he had "interaction with any kids either through family, nieces, nephews or anything like that." Then, when asked whether he saw nieces and nephews when he went back to Alabama, he answered, "Oh, yes, my cousins." Later, speaking without notes based on memory, the prosecutor said his concern was that B.D. "was unable to say that

he had any interaction with *cousins* ever going back to Alabama." (Italics added.) But it is clear in context that what he meant was B.D. was unable to say he had interactions with relatives *who were children*. The misstatement that B.D. never interacted with his "cousins" does not undermine the prosecutor's credibility and does not raise an inference of improper discrimination.

Further, the prosecutor used his tenth peremptory challenge to excuse B.D. Of the nine prospective jurors the prosecutor previously excused by peremptory challenge, six of them also indicated they had no children. The trial court reasonably could consider the fact that the prosecutor used two-thirds of his peremptory challenges on persons without children in deciding the genuineness of his stated reason for excusing B.D.

Comparative juror analysis does not demonstrate pretext or racial discrimination either. Jurors No. 9 and No. 36 had no children, and remained in the jury box at the time the prosecutor used a peremptory challenge to excuse B.D. But Juror No. 9 saw his nieces and nephews once or twice a year, and some lived nearby while others were in Southern California. The prosecutor reasonably could have determined Juror No. 9 was a more suitable prospective juror because he likely had more interactions with children than did B.D., whose relatives lived in Alabama. And the prosecutor may have believed Juror No. 36 would be more sympathetic to the prosecution's case because his aunt was the victim of childhood abuse and his grandmother was a child's advocate attorney.

Finally, there is no racial identity between defendant and B.D., so this is not a case that "raises heightened concerns about whether the prosecutor's challenge was racially motivated." (*O'Malley*, *supra*, 62 Cal.4th at p. 980.) On this record, there was substantial evidence that the prosecutor's stated reason for challenging B.D. was genuine, and not pretext for discrimination.

B. *Sufficiency of Evidence*

Defendant was found guilty of two counts of lewd conduct with Jane. The prosecutor argued to the jury that the two charges were based on Jane pointing out two different locations—the couch in the living room and the bedroom—"where this game with *carotcha*, that she just talked about in the CIC interview" took place in her

apartment. He further argued, "[W]e know this happened more than once because [of] the manner in which she describes" the game as a regular occurrence.

Defendant asserts the second count must be reversed for lack of sufficient evidence. We conclude there was sufficient evidence to support two counts of violation of section 288.

1. *Applicable Legal Principles*

" 'When a defendant challenges the sufficiency of the evidence, " '[t]he court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.' " ' . . . 'Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury rather than the reviewing court that weighs the evidence, resolves conflicting inferences and determines whether the People have established guilt beyond a reasonable doubt.' [Citation.] ' " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " ' " (*People v. Casares* (2016) 62 Cal.4th 808, 823–824.)

Further, "it is now well established that a child's testimony cannot be deemed insubstantial merely because of his or her youth. Thus, 'under present law, no distinction is made between the competence of young children and that of other witnesses [citations].' " (*People v. Jones* (1990) 51 Cal.3d 294, 314–315 (*Jones*).)

Our Supreme Court has recognized that cases involving sex offenses against children "frequently involve difficult, even paradoxical, proof problems" because young victims allegedly molested over a period of time "may have no practical way of recollecting, reconstructing, distinguishing or identifying by 'specific incidents or dates' all or even any such incidents." (*Jones*, *supra*, 51 Cal.3d at p. 316.) In *Jones*, the court addressed what constitutes sufficient evidence to support multiple convictions when the evidence consists of a young witness's "generic" testimony, meaning testimony that

describes repeated sex offenses but fails to "distinguish[] between time, place or circumstance." (*Id*. at p. 308.)

"The victim . . . must describe *the kind of act or acts committed* with sufficient specificity, both to assure that unlawful conduct indeed has occurred and to differentiate between the various types of proscribed conduct (e.g. lewd conduct, intercourse, oral copulation or sodomy). Moreover, the victim must describe the *number of acts* committed with sufficient certainty to support each of the counts alleged in the information or indictment (e.g., 'twice a month' or 'every time we went camping'). Finally, the victim must be able to describe *the general time period* in which these acts occurred (e.g., 'the summer before my fourth grade,' or 'during each Sunday morning after he came to live with us') to assure the acts were committed within the applicable limitation period. Additional details regarding the time, place or circumstance of the various assaults may assist in assessing the credibility or substantiality of the victim's testimony, but are not essential to sustain a conviction." (*Jones, supra*, 51 Cal.3d at p. 316.)[7]

2. *Analysis*

Defendant does not dispute there was sufficient evidence to support his conviction of count 1. Thus, he does not dispute that Jane's description of "play[ing]" with defendant's "caratcha," together with her demonstration of actions that appeared to be masturbation, supported a finding that defendant committed lewd conduct upon Jane in violation of section 288. Defendant only claims there was no substantial evidence to support *two* counts of lewd conduct. We disagree.

Initially, Jane told her Sunday school teacher " '[*s*]*ometimes* I get to play with his *carotcha*' " (some italics added), suggesting this "game" of touching defendant's penis

[7] In *Jones*, a jury found the defendant guilty of six counts of lewd conduct with a minor. The appellate court reversed four of the counts for insufficient evidence, but our Supreme Court concluded there was sufficient evidence to support the four counts of lewd conduct where the victim testified oral copulation occurred "once or twice each month" during the period he lived with the defendant, and the victim identified five separate locations where the conduct occurred. (*Jones, supra*, 51 Cal.3d at pp. 301, 316.)

was not a one-time event. Then, in her CIC interview, Jane said she played with her father's "caratcha" "when my daddy comes over."[8] Jane's mother testified that defendant visited their apartment on a semi-regular basis. From this evidence, the jury could reasonably infer that Jane touched defendant's penis on a semi-regular basis, even though no precise number of times could be determined. When asked where in the apartment she played the "games that she played with her father" that she discussed during the CIC interview, Jane pointed to two locations—the bedroom and the sofa in the living room. This was sufficient evidence for the jury to infer that Jane played the "game" involving touching defendant's penis at least two times, once in the bedroom and once on the sofa in the living room.

We are not persuaded by defendant's argument that "Jane failed to provide any description of what took place in the living room area such that the jury could infer that what happened in the bedroom also happened elsewhere in the apartment." Again, defendant does not dispute that Jane's description of the "game" she played with defendant's "caratcha" was sufficient to establish he committed lewd conduct with her. In context, Jane's response to the detective that she played this "game" with defendant in two different locations in her apartment was sufficient evidence for the jury to infer the lewd conduct occurred on the sofa in the living room.

C. *Right to Confront Adverse Witness*

Finally, defendant contends he was denied his Sixth Amendment right to confront adverse witnesses because "for all intents and purposes," Jane was unavailable for cross-examination. Therefore, he argues, her CIC interview should not have been admitted in evidence.[9] This contention lacks merit.

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[8] This is similar to the description " 'every time we went camping' " cited in *Jones* as an example of testimony that may be sufficient to establish the number of acts. (*Jones*, *supra*, 51 Cal.3d at p. 316.)

[9] The CIC interview was admitted under Evidence Code section 1360. The statute provides in relevant part: "In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse or neglect performed with or on the child by another . . . is not made inadmissible by the

1. *Background*

After the trial started and outside the presence of the jury, the trial court conducted a voir dire examination of Jane to determine whether she was competent to testify. The court found her "more than competent to testify." This finding is not contested on appeal.

Under section 868.5, in cases involving certain offenses (including a lewd act with a child under 14), a prosecuting witness is entitled to have two support persons in attendance during the witness's testimony, and one of those support persons may accompany the witness to the witness stand. (§ 868.5, subd. (a).) Here, Jane's support persons were her aunt and Lauren, a victim/witness advocate. The court allowed Lauren to sit with Jane while she testified.[10]

On direct examination, Jane initially gave background information (such as age, school, grade, and her hopes for her upcoming birthday), and the prosecutor established that she understood the difference between the truth and a lie.

When the prosecutor asked about defendant's behavior and his "*carotcha*," Jane was not as forthcoming as she had been with Boyd and in the CIC interview. She testified she did not know where she heard the word "*carotcha*" before, she saw defendant's "*carotcha*" only one time, and she denied doing anything with defendant's "*carotcha*."

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hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child . . . [t]estifies at the proceedings." (Evid. Code, § 1360, subd. (a)(1)–(3)(A).)

Here, defendant makes no claim that the interview lacks sufficient indicia of reliability, and Jane testified at trial. Thus, the CIC interview was admissible under Evidence Code section 1360. Defendant argues, however, that Jane's testimony failed to satisfy his Sixth Amendment right to confront witnesses, and is tantamount to Jane not testifying at all.

[10] Jane's mother testified after Jane's testimony was completed. It appears that witnesses were excluded from the courtroom (Evid. Code, § 777), so Jane's mother was not in the courtroom when Jane testified.

The prosecutor showed Jane a diagram of a boy, so she could circle where the "*carotcha*" was. Jane said, "Okay. But I have to tell my auntie something." The prosecutor said he wouldn't be too long, and Jane agreed to wait.

When asked what she did when she saw her father's "*carotcha*," Jane responded she "didn't do nothing" with it. Then she interjected, "But first I want to give my auntie a hug right now." The court agreed that Jane could give her aunt a hug and continue testifying. Jane apparently left the stand and returned. (The court observed, "Okay. She's back on the stand.") Jane said, "Sorry about that." The prosecutor continued to ask about what she did when she saw her father's "*carotcha*." She answered, "I would just let him do what he was going to do." The prosecutor asked, "And what would he do?" Jane responded, "I'm going to tell you my story right now." She then testified about "milk that came out or something" as described above.

Asked whether anyone touched defendant's "*carotcha,*" Jane said, "I don't even know for myself. I'm just a kid." She agreed that she was a little nervous, and said it was tough to talk because "I'm kind of feeling scared." The prosecutor asked again, "When you saw the *carotcha*, was anyone touching it?" She answered, "I said I don't know." Then she said, "I don't know if anybody's touching the *carotcha* or what's happening, okay? All I just know is I think something came out when he shaked it. And he, you know, took me to the same place without my mom because my mom didn't want to go."

The prosecutor asked, "When something came out when he shaked it, where did it go?" Jane said she didn't know. He continued, "Did you see where it went?" Jane responded, "No. It was because my mom couldn't sleep." The prosecutor asked what happened to "the milk stuff," and Jane responded, "I don't know, but—what it was or what happened. All I just know is that this, um, is my story. That's all I know right now and the answers." The prosecutor said he appreciated her telling him his story and asked where it happened. She said, "When he shaked it, yes. The one by the restaurant, no."

The prosecutor asked whether Jane wanted some water. She said, "Yeah, a little bit. I can do it myself." She may have spilled water at this point, as she next said, "I'm

sorry. I'll get a napkin and clean it up." The prosecutor continued with his questions. He asked, "[D]id you see your dad shake it more than once or one time?" Jane answered, "I think one time." He asked, "Were you supposed to tell anyone about that?" Jane responded, "I don't know," and then, "Actually, no, but only you guys because that's my story." The prosecutor asked whether she saw defendant's "*carotcha*" more than one time. Jane answered, "Uh, not really that—I saw it one time. I don't remember how much I saw it. [¶] I think the color is a little bit green." The prosecutor asked, "Is it hard for you to talk about this in here, [Jane]?" She responded, "Yeah, because I'm really scared and I miss my mama." He asked whether she saw her dad sitting somewhere in the courtroom, and Jane pointed toward defendant.

On cross-examination, defense counsel told Jane she could ask for a break, "So you're in control, all right?" Jane responded, "Okay. Because I really feel nervous," and, "Yeah, because I'm really missing my momma." Defense counsel said, "We're not going to take very long, but is it okay if I ask you a few more questions?" Jane answered, "Yeah."

Defense counsel asked about the last time Jane saw defendant. She agreed it was when he took her to "the fish place," and this was the restaurant she had been talking about. Defense counsel asked questions about Jane's living situation. She testified that she lived with her mother. Jane said she had an older brother who did not live with them. Defense counsel asked whether it was just Jane and her mom in her house. Jane explained that her uncle was currently staying with them, but "[h]e's just staying there because he has chemo." At this point, Jane asked for a break, and the court allowed a 10-minute break.

After the break, defense counsel asked Jane, "Did you have a nice break?" She answered, "Yes. I just kind of missed my mom." Defense counsel said, "I'm just going to have you here for a few more minutes and then can you go back with your mom, okay?" Jane responded, "Okay."

Defense counsel asked Jane about the time she saw her father "when your mom couldn't sleep." He asked if that was at night, and Jane responded that she thought it was

at naptime. She testified, "[Mom] went out to the living room to sleep and then I came to bed and my dad stuff, I don't know what came out." Asked whether Jane walked into the bedroom, she answered, "No, I went on my bed to sleep. [¶] . . . [¶] And my dad went in my mom's and slept in the bigger bed and—I don't remember."

Defense counsel asked how many rooms were in her house. Jane responded, "I have the bathroom, the living room, the kitchen, and the bedroom. So four rooms." She explained that her bed used to be in the bedroom, "but now it's not." Counsel asked, "When your dad was visiting you, was your bed in the bedroom at that time?" She said, "Uh, uh, what did you say? I forgot." Asked whether her bed was in the bedroom when defendant would visit, Jane responded, "Oh, that. That's because I don't even have a normal bed, but I think soon my mommy will get my own bed and I'll get my ears pierced." Counsel said, "I hope that happens. [¶] But you said your bed moved, right?" Jane answered, "It got—yeah, sort of a way. I don't know why. Can I do something a second. I forgot." Jane then said, "She doesn't know, but you—auntie thought I said you know, uh . . . [¶] . . . [¶] We have to get rid of the bed." It seems Jane looked to her aunt for help answering the question about what happened to her old bed, as she said, "I can't remember and I had to ask my auntie because she knowed it, but she doesn't remember."

Defense counsel continued, "You were saying that you were in your bed [¶] . . . [¶] —and your mom and your dad were in the same room in another bed, right?" Jane agreed, "They were in my momma's bed, yes," and Jane was in her own bed. Counsel asked, "And is that when you saw your dad's *carotcha*?" Jane responded, "Not yet." Counsel repeated, "Not yet." Jane said, "It was—hm, I can't say." The court interrupted, "Can't remember?" Jane tried to remember: "I can't remember. I'm just trying to think it." The court told her, "Okay. Take your time," and defense counsel said, "[Jane], take as much time as you need if you need to think." Jane eventually responded to the question, "It's when my mom left."

Defense counsel asked, "So you say your mom—but your mom left and were you in your bed?" Jane answered, "Yes, but I have to talk to Lauren about something for a second." Jane talked to the victim/witness advocate. She then explained she was getting

hungry, but her mom's chocolate bar melted in her pocket. Defense counsel said, "I hope you get one soon. We're just going to be a few more minutes." Jane said, "Maybe I'm going to get some ice cream after." Counsel expressed the hope that she would, and then started in with, "[Jane], let me just ask you a few more questions and then you can have ice cream or whatever you want. [¶] Has your mom talked to you about your dad?" Jane responded, "I kind of feel nervous right now," and asked if Lauren could answer for her. The trial court addressed Jane: "I need you to just sit here and answer these questions, because then you're going to get done a lot faster, all right? [¶] . . . [¶] If you don't know the answer say 'I don't know,' okay? If you don't know or you don't understand, tell them that you don't know or don't understand." Jane said, "Okay."

Defense counsel again asked whether her mom talked to her about defendant, and Jane responded, "Not all that much. And, yes." Jane said she did not know if she told her mom about defendant before coming to court. She remembered talking to her Sunday school teacher about defendant. Counsel asked whether her mom talked to Jane about her dad. She responded, "Yeah. And I get to play with a toy after I'm done." Counsel asked, "What kind of things does your mom say about your dad?" Jane answered, "All I—I remember one. Let me see. [¶] Oh, yes. And, uh, I told her the story a long time ago." Counsel followed up, "You told your mom a story a long time ago?" Jane said, "Well, yes."

Defense counsel asked, "Do you remember what your mom said?" Jane said no. Then she asked, "Can I please have one more break?" The trial court asked defense counsel how much longer he would take, and he said "[p]robably just a couple minutes." The court told Jane they would go just a couple more minutes, and then she could go. Jane responded, "I want to go play." The court encouraged her to "[a]nswer the nice man's question." Counsel asked, "So, [Jane], you're saying you don't remember what your mom said to you about your dad?" Jane responded, "I remember a little, actually." He asked, "Can you tell me the little bit that you could remember?" She said, "One thing I remember right now. [¶] . . . [¶] He [*sic*] said that—is there anything he actually done to you?" She said that was all she could remember. Defense counsel then thanked Jane

for answering his questions: "[Jane], I want to thank you very much, okay, for answering my questions and for answering this nice young man's questions. Thank you." Jane said, "You're welcome." There was no redirect examination, and the prosecutor asked that Jane be excused subject to recall.

The next day, defense counsel asserted defendant's "rights of confrontation were not satisfied" by Jane's testimony and, therefore, the CIC interview should not be admitted. He argued that while Jane was physically present, "she answered five percent of the questions that [he] asked." He noted the prosecutor "had similar problems but she was able to answer questions. But by the time we got to me, whatever happened, she was not there." He told the court: "I don't see how I could even have asked her anything substantive about the charges. [¶] And now we're going to hear a tape, which I can't cross-examine—I couldn't cross-examine her on any of the things that are on the tape, about anything that happened. And if it was an adult who refused to answer questions, who got off the stand and ran to her aunt and ducked down and did various things, obviously the Court could hold that person in contempt, could order them to answer the question. That option, obviously, is not available with a child. And I don't see how that was really cross-examination."

Defense counsel, however, did not claim Jane was incompetent to testify in general. "[S]he, yes, probably does have the capacity to do better than she did, but, again, maybe it was the amount of time being on the stand, being in front of all these people, whatever reason. I mean, it was like her competency sort of flew out the window at a certain point." He said, "I mean, I could have kept going and kept going with this kid but I think it would only have gotten worse. I think it would have alienated the jury, and I tried different tactics."

The trial court suggested that Jane could be recalled, and defense counsel could question her further. Defense counsel did not take up the court's offer to recall Jane. The prosecutor responded that he did not think that was appropriate because defense counsel already had an opportunity to question her, and minor witnesses should not be "overly traumatized by the process." The prosecutor also disagreed with defense counsel's claim

that he was unable to cross-examine Jane, arguing, "Jane . . . never failed to answer any questions. She answered [defense counsel] as you would expect any child of her age to answer them. In fact, she seemed to be even almost brighter than most children her age."

After hearing the parties' arguments, the trial court determined that Jane's testimony satisfied defendant's right to cross-examination. The court explained to defense counsel: "[Jane is] five-and-a-half years old, she is very energetic, so she wasn't able to sit still, she wasn't able to really focus, but she was very smart, I thought, and absolutely comprehended the questions. I think that she made some decisions to answer them indirectly. Every time she looked over at her father is when she said she didn't know the answers to your questions. I think when she said she was nervous about being in the courtroom, that impacted how she answered the question[s] regarding what her father is alleged to have done to her. [¶] So, it was not optimal for you; however, you did have the opportunity to cross-examine her and to confront her. I think the confrontation clause only requires that. And you did have that opportunity. So, I'm going to find that it was satisfied and I am going to allow the [CIC interview]."

2. *Applicable Legal Principles*

"The Confrontation Clause of the Sixth Amendment gives the accused the right 'to be confronted with the witnesses against him.' This has long been read as securing an adequate opportunity to cross-examine adverse witnesses." (*United States v. Owens* (1988) 484 U.S. 554, 557 (*Owens*).) "This confrontation right seeks 'to ensure that the defendant is able to conduct a "personal examination and cross-examination of the witness, in which [the defendant] has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief." ' " (*People v. Cromer* (2001) 24 Cal.4th 889, 896–897.)

However, " '[t]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." ' " (*Owens*, *supra*, 484 U.S. at p. 559.) The

United States Supreme Court has recognized that the "opportunity [for cross-examination] is not denied when a witness testifies as to his current belief but is unable to recollect the reason for that belief. It is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and . . . the very fact that he has a bad memory." (*Ibid*.)

In *People v. Clark* (2011) 52 Cal.4th 856, 925, a doctor was permitted to testify about what the victim, Angie, told her during a sexual assault examination. Angie testified at trial, but she could not remember her interview with the doctor. Our high court rejected the defendant's claim that admission of Angie's out-of-court statement violated his right to confront witnesses. "Angie appeared as a witness at trial and was subjected to extensive cross-examination. No more was constitutionally required." (*Id.* at p. 927.) The court explained, "In the present case, defense counsel cross-examined Angie extensively and elicited from her that she could not remember various details of the crimes. Her inability to recall making the statement to Dr. Fisher was a factor for the jury to consider in determining the weight to give that evidence, but did not render its admission a violation of the confrontation clause." (*Ibid*.)

As we have seen, a young child may be a competent witness, and her testimony "cannot be deemed insubstantial merely because of . . . her youth." (*Jones, supra*, 51 Cal.3d at p. 315.) But courts have also recognized that "putting a child on the stand, regardless of her mental maturity, is not sufficient to eliminate all Confrontation Clause concerns." (*United States v. Spotted War Bonnet* (8th Cir. 1991) 933 F.2d 1471, 1474 (*Spotted War Bonnet*); *People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 967 (*Giron-Chamul*).) "If, for example, a child is so young that she cannot be cross-examined at all, or if she is 'simply too young and too frightened to be subjected to a thorough direct or cross-examination[,]' [citation], the fact that she is physically present in the courtroom should not, in and of itself, satisfy the demands of the Clause. Under *Owens*, however, a perfectly satisfactory cross-examination is not required by the [Confrontation] Clause, and a witness who cannot remember the details of statements she has made in the past can still be sufficiently available for cross-examination to satisfy the constitutional

requirement." (*Spotted War Bonnet, supra,* 933 F.2d at p. 1474 [concluding there was sufficient opportunity to cross-examine witnesses who were seven years old and six years old at the time of trial].)

"We review de novo a claim under the Confrontation Clause that involves mixed questions of law and fact. [Citation.] Under this standard, we defer to the trial court's determination of 'the historical facts' . . . but not the court's 'application of [the] objective, constitutionally based legal test to [those] historical facts.' " (*Giron-Chamul, supra,* 245 Cal.App.4th at p. 964.) As the court observed in *Spotted War Bonnet*, our review is limited to "what is apparent from the written record. The trial judge was in a much better position to observe and assess what actually happened in the courtroom." (*Spotted War Bonnet, supra,* 933 F.2d at pp. 1474–1475.)

3. *Analysis*

Defendant contends, "In this case, no adequate opportunity for cross-examination took place because Jane refused to cooperate with the questioning process either out of fear, immaturity, or both." He argues that while he was "not entitled to a witness with a good memory or a normal attention span, he was entitled to a witness who made a sincere effort to cooperate on the stand and provide responsive answers to his counsel's questions." Defendant describes Jane as "complain[ing] about being hungry" and "claim[ing] that she was nervous."

We disagree with his characterization of Jane's testimony. From our review of the record, it appears that Jane was generally responsive to questions from both the prosecutor and defense counsel, and she never refused to answer questions. She made appropriate use of her support system—her aunt and the victim/witness advocate as provided for by statute. (§ 868.5.)[11] The trial court noted that she was nervous, but she didn't clam up or stop responding to questions. To the contrary, the record shows her engagement and persistent effort to answer the questions posed by each side. Jane

[11] The purpose of the support person statute is to permit a "witness to more easily come forward and to reduce the psychological harm and trauma the witness might experience." (*People v. Patten* (1992) 9 Cal.App.4th 1718, 1726.)

responded to the court's encouragement that she take her time to remember, and she continued to try to remember and answer substantive questions throughout her testimony. Defense counsel may have curtailed his cross-examination out of fear of alienating the jury, but this does not mean he was denied an opportunity to cross-examine Jane.

Giron-Chamul provides an example of witness testimony that did effectively deny the defendant an opportunity to cross-examine. *Giron-Chamul* involved charges of sexual abuse of the defendant's young daughter. (*Giron-Chamul*, *supra*, 245 Cal.App.4th at p. 936.) The witness and alleged victim was five years, two months old at the time of trial. (*Id*. at p. 941.) She was permitted to testify by closed-circuit television in a jury deliberation room at a conference table. (*Id*. at p. 942.) On direct examination, she spun around in her chair and lay across the table, and about 10 minutes into her testimony, she disappeared under the table. She repeatedly refused to come out, and the trial court granted a recess. After the break, the witness again disappeared under the table and would not "get back in her chair until the prosecutor promised they would 'talk about something else.' " (*Id*. at pp. 943–944.) When the prosecutor asked about what her father did to her, she "flatly refused." (*Id*. at p. 944.) The next day, the prosecutor asked four more times what the defendant had done to her, and the witness refused to answer, went under the table, and then said, " 'I'm not going to answer questions.' " (*Id*. at p. 945.)

In cross-examination, the witness began responding by moving her lips without making any sound. "Eventually, she said she wanted to talk to the prosecutor instead of" defense counsel. (*Giron-Chamul*, *supra*, 245 Cal.App.4th at p. 947.) She again disappeared under the table and then sat on the victim's advocate's lap. She gave unintelligible responses to defense counsel's questions. "[T]he prosecutor attempted to convince [the witness] to talk to defense counsel by explaining that he was one of the prosecutor's friends, but [she] yelled 'No' when asked if she would answer his questions. She said she '[did not] like talking to him' and wanted to talk to the prosecutor instead." (*Id*. at p. 948.) The witness answered questions unrelated to the trial, but went under the

table again when asked about her father. Later, "she stopped answering questions, saying she did not want to talk anymore and 'want[ed] to go home.' " (*Id*. at p. 949.)

After another break, the witness continued not to respond to defense counsel's substantive questions. (*Giron-Chamul, supra*, 245 Cal.App.4th at p. 950.) The next day, defense counsel asked her a series of questions about the defendant's alleged conduct, but she did not answer and crawled around under the table. "When counsel switched to asking her about the drawing she had done at the daycare provider's house, [the witness] briefly emerged to look at the monitor, but she began walking around the room and did not respond to questions about the drawing except to say that she did not want to talk about it." (*Id*. at p. 951.) Later, she told defense counsel to leave her alone. After another break, "she got out of her chair, drew her hand across her throat, and made a gesture into the camera as if she were breaking something with both hands. She got back in her chair, but she told defense counsel to '[l]eave [her] alone' after he asked if she was ready to start answering questions." (*Ibid*.)

On appeal, the defendant argued the witness's refusal to answer questions denied him his right to confrontation. (*Giron-Chamul, supra*, 245 Cal.App.4th at p. 961.) The Court of Appeal noted that the witness "would not answer hundreds of other questions, including approximately 150 questions on important topics such as where she learned the word 'penis,' whether she had seen the penis of anyone other than her father, . . . and anything related to her drawing or forensic interview." (*Id*. at p. 966.) The court recognized that different concerns arise when a child witness refuses to answer questions as opposed to when a reticent adult witness does so. "An adult witness's difficult and defiant conduct, such as refusing to answer questions, gives rise to an inference that the testimony the witness does give is not believable. [Citations.] A similar inference does not arise when a child witness has difficulty answering questions. Indeed, a child's reluctance to answer questions, especially about sensitive subjects such as molestation, may enhance the child's credibility to the extent it suggests that whatever happened is too traumatic for the child to discuss." (*Id*. at p. 967.)

The court surveyed out-of-state authority on the issue of cross-examining child witnesses. The court found cases that "held that the right to cross-examination was violated where very young witnesses appeared at trial but were essentially unable to testify at all," and "at least two courts have held that a child's refusal to answer most questions on cross-examination after providing some testimony on direct resulted in a violation of the Confrontation Clause." (*Giron-Chamul*, *supra*, 245 Cal.App.4th at p. 967–968, citing cases.) On the other hand, "as in cases involving adult witnesses, a child's failure to answer some questions does not automatically establish a constitutional violation." (*Id*. at p. 968.)

The *Giron-Chamul* court concluded the defendant was deprived of his right to cross-examine. "In our view, these [out-of-state] decisions suggest a continuum on which the right to an opportunity for effective cross-examination is more likely violated as the number of relevant questions that go unanswered increases. [Citation.] Here, [the witness] refused to answer hundreds of questions, of which approximately 150 were substantive. And nothing about her lack of cooperation can be attributed to the trial court, prosecutor, or defense counsel, all of whom took laudable measures to try to make it easier for her to testify. . . . [¶] Despite these measures, [the witness] refused to respond to many questions that were crucial to testing her claims, particularly those involving her drawing and her report to the daycare provider, the forensic interview, and other possible explanations for her apparent sexual knowledge. Nor would she respond to many questions bearing on her credibility more generally . . . ." (*Giron-Chamul*, *supra*, 245 Cal.App.4th at p. 968.)

While we do not suggest that the witness's conduct in *Giron-Chamul* sets the minimum standard for a constitutional violation, Jane's behavior on the stand is in sharp contrast to that case. The trial court observed that Jane comprehended the questions, she was nervous about being in the courtroom, and she answered some questions "indirectly." But she never refused to answer questions, and she continued to answer defense counsel's substantive questions even after she understandably expressed that she was scared, nervous, and missed her mother, who was not in the courtroom when she testified. On

our reading of the record, we cannot say defendant was denied his Sixth Amendment right of confrontation. Defense counsel was able to question Jane, she provided coherent responses, and the jury was able to observe her and evaluate her credibility. No more was constitutionally required.

DISPOSITION

The judgment is affirmed.

_____
Miller, J.

We concur:

_____
Kline, P.J.

_____
Stewart, J.

A140212, *People v. Heartsill*